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BOARD OF PATENT APPEALS AND INTERFERENCES

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*Ex parte* DOUGLAS L. GOEDEKEN, DAVID J. DOMINGUES,  
JOHN J. FENSKE, MICHAEL J. ANTINONE, JILL M. WESTLUND  
and CURTIS M. DEMULLING

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Appeal 2011-003533  
Application 10/677,029  
Technology Center 1700

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*Before:* FRED E. McKELVEY, RICHARD E. SCHAFER, and  
SALLY GARDNER LANE, *Administrative Patent Judges.*

McKELVEY, *Administrative Patent Judge.*

**DECISION ON APPEAL**

**Statement of the case**

General Mills Marketing, Inc. (General Mills), the real party in interest (Brief, page 3), seeks review under 35 U.S.C. § 134(a) of a final rejection mailed 26 January 2010.

The application was filed on 1 October 2003.

The application has been published as U.S. Patent Application Publication 2005/0074534 A1.

Claims 1-3, 6, 10-11, 21-25 and 28-32 are in the application and are on appeal.

The Examiner mentions the following evidence.

Freyn	U.S. Patent 5,451,417	19 Sept. 1995
Moder	U.S. Patent 6,579,554 B2	17 June 2003

Freyn is prior art under 35 U.S.C. § 102(b).

Moder is prior art under 35 U.S.C. § 102(a).

General Mills calls attention to (Brief, page 12):

McGee, Harold	On Food and Cooking, The Science of Lore of the Kitchen, page 305	No date given
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In view of the arguments made by General Mills and our disposition of the appeal, we have not found it necessary to consider Moder.

We have jurisdiction under 35 U.S.C. § 134(a).

**Analysis**

The necessary facts appear in our discussion of the issues raised by General Mills in the appeal contesting the Examiner's refusal to allow the claims on appeal.

*The rejections*

The Examiner has declined to allow Claims 1-2, 10-11 and 28-32 as being anticipated under 35 U.S.C. § 102(b) by Freyn. Answer, page 3.

The Examiner also has declined to allow Claims 3, 6 and 21-25 as being unpatentable under 35 U.S.C. § 103(a) over Freyn. Answer, page 4.

*Evidentiary matters*

General Mills has cited and relied upon a quote said to come from page 305 of McGee. Brief, page 12. We decline to consider the quote.

According to General Mills, on page 305, McGee is said to state (italics added):

Both milk and eggs contribute three major ingredients: water, protein, and fat. The first must be taken into account when determining how much *liquid* to add to the flour.

McGee is not entitled to be considered on appeal. General Mills has not complied with the requirements of the evidence appendix provisions of 37 C.F.R. § 41.37(c)(1)(ix). General Mills does not tell us where McGee was "entered" by the Examiner and General Mills did not provide a copy of the relevant pages of McGee in the evidence appendix. The Examiner properly did not discuss McGee in the Answer.

General Mills discusses a Rule 132 Domingues Declaration filed on 7 October 2008. The Examiner declined to consider the Rule 132 Declaration

because it was held to be not legible. Answer, page 7. The Examiner states that a legible declaration was never submitted. Accordingly, we will not consider the 7 October 2008 declaration and arguments based on the declaration because it was not admitted or considered by the Examiner.

*Position of General Mills*

General Mills maintains that the rejections are incorrect and asks for reversal.

We proceed directly to an analysis of the reasons advanced in the Brief by General Mills.

With respect to the anticipation rejection, General Mills does not single out any particular claim for separate consideration—indeed General Mills argues the claims as a group. Accordingly, as to the anticipation rejection we select Claim 28 to resolve the appeal. *See* 37 C.F.R. § 41.37(c)(1)(vii).

*Claim 28*

Claim 28 reads [bracketed matter added, limitations in issue in italics]:

An unproofed frozen dough composition comprising leavening agent comprising

[1] yeast, and

[2] chemical leavening agent comprising

[2.1] acidic active agent selected from the group consisting of monocalcium monohydrate, glucono-delta-lactone, sodium acid pyrophosphate, and combinations thereof,

[2.2] basic active agent,

[2.3] flour, and

[2.4] water

[3] *the weight ratio of flour to water is in the range from 1.67 to*

*1.82;*

[4] *the dough composition, after thawing, can proof at retarder conditions; and*

[5] *retarder conditions comprise a temperature in the range of 32 °F to 46 °F.*

*Issue 1—anticipation—the flour-to-water ratio*

The Examiner found that Freyn describes, in Example 6, a flour-to-water ratio of 1.70: “Example 6 shows a ratio of 1.70 which falls within the claimed range in claims 28 and 1.” Answer, page 4:9-10.

General Mills maintains that the Examiner erred in finding that Freyn describes a ratio of 1.70. Brief, page 11. Example 6 of Freyn describes a dough prepared using the following ingredients (col. 9:7-2):

Ingredients	Percent by weight
Bread Flour, Treated	70.94%
Bread Flour, Hi Gluten	29.06%
Sucrose	8.19%
Shortening-Liquid (partially hydrogenated soybean and cottonseed oils)	16.37%
Non Fat Dry Milk	2.73%
Dough Conditioner	0.50%
Panipulus M Salt	1.43%
Baking Soda	3.41%
Sodium Aluminum Phosphate	3.79%
Yeast (dry yeast)	4.77%
Liquid Egg	5.46%
Water	58.6%

1  
2 The amount of flour is  $70.94\% + 29.06\% = 100\%$ .  
3 The amount of water is  $58.6\%$   
4 The ratio of flour to water is  $100/58.6 = 1.7064 = 1.71$ .  
5 The Examiner appears to have rounded  $1.7064$  to  $1.70$ .  
6 Both  $1.70$  and  $1.71$  are within the claimed range of  $1.67$  to  $1.82$ .  
7 General Mills maintains that the Examiner did not calculate the amount of  
8 water correctly. Brief, page 11:5 to page 12:three lines from bottom.  
9 According to General Mills, the Examiner overlooked water, which is said to  
10 be present in eggs, with eggs being present as an ingredient in Freyn Example 6.  
11 Brief, page 12.

1 If, as General Mills asserts (without any supporting evidence), eggs contain  
2 76% water, then according to General Mills, when the egg water is included, the  
3 flour-to-water ratio becomes 1.60—outside the claimed range of 1.67 to 1.82.

4 The Examiner found that the claimed flour-to-water range is based on the  
5 examples of the Specification which describe flour to water ratios of (1) 1.73,  
6 (2) 1.67, (3) 1.75, (4) 1.82 and (5) 1.81.

7 The claimed range includes all the ratios from 1.67 to 1.82 and is sanctioned  
8 by *Ex parte Jackson*, 110 USPQ 561, 562 (Bd. App. 1956).

9 The flour-to-water ratio limitation was added to the claims after the  
10 application was filed.

11 Therefore, the Specification does not explicitly define a “flour to water  
12 ratio.”

13 Addition to claims of limitations not explicitly described in a specification  
14 often leads to complications. *See, e.g., Linn, Perspectives on Becoming a*  
15 *Successful Examiner*, 91 J. Pat. & Tm. Office Soc'y 418, 421 (No. 6 June 2009) (In  
16 case after case before my court, the central debate revolves around the meaning of  
17 claim terms that, for example, were added during prosecution and do not appear  
18 anywhere in the written description. For those cases, the meaning of the claim  
19 limitation has to be inferred from other words, leaving the issue open to  
20 unnecessary dispute and leading frequently to protracted and costly litigation.)

21 The General Mills Specification describes addition of “liquid” components  
22 to dough (Specification, page 13:24-27) (*italics added*):

23 Examples of *liquid* components include *water*, milk, *eggs*, and oil, or  
24 any combination of these. Amounts of such *liquid* components are



1           well known. The amount of *liquid* component included in any  
2           particular dough composition can depend on a variety of factors  
3           including the desired moisture content of the dough composition.

4           The Specification upon which the flour-to-water ratio is said to be based  
5           distinguishes between liquids and water.

6           Claim 28 does not refer to a flour-to-“liquid” ratio; it refers to a water-to-  
7           flour ratio. Based on the Specification, the Examiner had a rational basis for  
8           determining that the flour-to-water ratio in the claims is based on water—not water  
9           plus water in eggs or other liquid contributing elements in Example 6 of Freyn.

10          As mentioned earlier, we decline to consider McGee. Had McGee been  
11         properly placed into the record, and putting aside the fact that only a brief quote is  
12         given (which may or may not be out of context), McGee, like General Mills, refers  
13         to “liquids” to be added to dough not water. McGee is consistent with the  
14         Specification. Moreover, in determining the meaning of a claim limitation, we are  
15         reluctant to rely on external sources particularly when the Specification itself  
16         discusses liquids to include water and eggs.

17         Freyn describes in Example 6 a flour-to-water ratio of 1.70 or 1.71 and that  
18         flour-to-water ratio meets the limitation of Claim 28.

*Issue 2—anticipation—the retarder conditions*

According to General Mills, Freyn does not describe a dough composition that is capable of “proofing” at retarder conditions after thawing. Brief, page 12:next to last line to page 13:last line.

In support of its position, General Mills mentions (page 13:second to last full paragraph) a Rule 132 Domingues Declaration submitted 7 October 2008. For reasons previously given, we decline to consider the declaration.

The Specification defines “proofed” as follows (page 6:16-17):

The term “proofed” is used herein refers to a dough composition that has been processed by a step intended to cause a volumetric rise in the dough.

The Examiner noted that the dough of Freyn Example 6 has the same flour-to-water ratio as the claimed dough and therefore one skilled in the art would assume that the Freyn Example 6 dough would “proof” at retarder conditions in a temperature range of 36 °F to 46 °F. Answer, page 9.

The Examiner also noted that, in a Rule 132 Domingues Declaration filed 8 March 2008 (which was admitted and considered), General Mills establishes that a Freyn dough “proofed” (increased in volume) at 40 °F and 45 °F. Answer, page 9. See Domingues Declaration of 8 March 2008 at (1) page 4, 40 °F data where a Freyn dough had a volume change of 34.41 % over a 24-hour period and (2) page 5, 45 °F data where a Freyn dough had a volume change of 36.03 % over a 24-hour period.

General Mills has not shown the Examiner’s findings, with respect to proofing at retarder conditions, to be erroneous.

Issue 3—obviousness—retarder to oven proofing

Apart from Claim 3, General Mills argues the claims rejected under § 103(a) as a group. We will consider Claim 21.

General Mills alleges that the Freyn dough is not capable of retarder-to-oven proofing. Rather, says General Mills, the Freyn dough is exclusively and very intentionally designed for freezer-to-oven baking performance. Brief, page 14:12 to page 15:20.

In assessing General Mills' position, we have not considered the argument on page 15:9-20 because, as noted earlier, the Examiner did not admit or consider the Rule 132 Domingues Declaration of 7 October 2008.

The principal argument by General Mills is that Freyn specifically set out to “invent” a freezer-to-oven dough which does not need to be proofed before being placed in an oven. Freyn, col. 1:57-61.

The Examiner points out (Answer, page 8) that Freyn reveals (col. 5:66 to col. 6:5) (italics added):

The frozen dough does not need to be thawed or proofed prior to baking, *albeit the dough may be thawed and proofed (that is, if thawing and proofing does take place, it will not detract from the quality of a baked product)*. The dough may be taken directly from the freezer to the oven. The resulting baked product substantially resembles a traditional proofed product in appearance, structure, and taste.

Contrary to assertions by General Mills, Freyn explicitly states that its dough may be thawed and proofed.

1 Apart from Claim 3, General Mills does not single out any particular claim  
2 for separate consideration with respect to the § 103(a) rejection.

3 Claims 6 and 22-25 fall with Claim 21.

4 *Issue 4—obviousness—raw specific volume*

5 General Mills maintains that Claim 3 is separately patentable. Brief,  
6 page 16:3 *et seq.*

7 Claim 3 calls for a Claim 1 “unproofed frozen” dough made from an  
8 unspecified amount of yeast and chemical leavening agent. The dough must proof  
9 at retarder conditions to a raw specific volume in a range from 1.5 to 3 cubic  
10 centimeters per gram (cc/g).

11 In the Final Rejection (page 3), the Examiner said the following (brackets  
12 and italics added):

13 As to the specific volume, this parameter can vary depending on the  
14 several factors including [1] the *amount of leavening agents* used,  
15 [2] the type of product, [3] the mixing time, [4] *the proportions of*  
16 *ingredients* used etc. It would have been obvious to one skilled in the  
17 art to determine the appropriate raw specific volume depending on the  
18 type of product and the specific texture and taste wanted.

1 In the Brief, General Mills states (page 16):

2 The rejections of record summarily conclude that it would have  
3 been obvious to one skilled in the art to determine the appropriate raw  
4 specific volume depending on the type of product and the specific  
5 texture and taste wanted, and that this is within the skill of one in the  
6 art through routine experimentation.

7 This conclusion is untenable, at least because this asserted  
8 ground of rejection is not supported by a reasoned analysis, but is a  
9 mere perfunctory conclusion lacking substantive support.

10 By “substantive support” we think General Mills means “evidence.”

11 The Examiner found that specific volume can vary depending on several  
12 factors including [1] the amount of leavening agents used, [2] the type of product,  
13 [3] the mixing time and [4] the proportions of ingredients used. General Mills has  
14 not challenged the correctness of the Examiner’s finding. We have no reason to  
15 question the accuracy of that finding. *In re Eskild*, 387 F.2d 987, 988 (CCPA  
16 1968) (Examiner’s statement relating to common practices in the art was accepted  
17 as factual in view of appellant’s failure to challenge the statement).  
18 Moreover, we have difficulty believing that General Mills would challenge as  
19 incorrect the Examiner’s finding that specific volume is a function, *inter alia*, of  
20 the amount of leavening agents and proportions of ingredients used.

21 The Rule 132 Domingues Declaration of 7 March 2008 (which was entered  
22 and considered by the Examiner) discusses raw specific volume of one of General  
23 Mills products (having a flour-to-water ratio of 1.70) vis-à-vis a modified version  
24 of a Freyn product (having a flour-to-water ratio of 1.51). The data set out in the

1 Declaration shows that a specific volume increases for both over time, albeit the  
2 Freyn product does not seem to reach a specific volume of 1.5 cc/g. As observed  
3 by the Examiner (Answer, page 10), the Declaration data is based on one example  
4 of Freyn. The declaration has no specific volume data for Freyn's Example 6  
5 which has a flour-to-water ratio of 1.70.

6 The Examiner's "untenable" conclusion (to use General Mills' words) is  
7 entirely logical when considered in light of the Examiner's unchallenged findings  
8 and the Rule 132 Domingues Declaration of 7 March 2008.

9 One skilled in the art is not an automaton. *KSR Int'l, Inc. v. Teleflex, Inc.*,  
10 550 U.S. 398, 421 (2007). The Examiner found that one skilled in the art knows  
11 that specific volume is a function of several parameters. There is no apparent  
12 reason on this record why one skilled in the art would be incapable of making a  
13 dough with a particular specific volume.

14 *Other arguments*

15 We have considered all of General Mills' arguments and find none that  
16 warrant reversal of the Examiner's rejections. *Cf. Hartman v. Nicholson*, 483 F.3d  
17 1311, 1315 (Fed. Cir. 2007).

18 **Decision**

19 Upon consideration of the appeal, and for the reasons given herein, it is  
20 **ORDERED** that the decision on the Examiner rejecting claims 1-2,  
21 10-11 and 28-32 based on anticipation is *affirmed*.

22 **FURTHER ORDERED** that the decision on the Examiner rejecting  
23 claims 3, 6 and 21-25 based on obviousness is *affirmed*.

**FURTHER ORDERED** that no time period for taking any  
subsequent action in connection with this appeal may be extended under 37 C.F.R.  
§ 1.136(a)(1)(iv).

**AFFIRMED**

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